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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33971

JOINT PETITION FOR DECLARATORY ORDER - BOSTON AND MAINE CORPORATION AND TOWN OF AYER, MA

Decided: December 22, 2000

In a joint petition filed December 1, 2000, Boston and Maine Corporation, Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc. (GTI) (collectively, Guilford) and the town of Ayer, MA (Town or Ayer) seek the issuance of declaratory order. This matter was referred to the Board by order dated October 19, 2000, by the United States District Court for the District of Massachusetts in Boston and Maine Corp. et al. v. Town of Ayer et al., Case No. 99-CV-12606 JLT.[1] The court asked that the Board "evaluat[e] the right of the [Town], if any, to regulate [Guilford's] proposed development off Willow Road in the Town of Ayer. . . ." The court requested that the Board address this case within 5 months, and Guilford and the Town have submitted a proposed procedural schedule.

GTI has operated an automobile unloading facility (which will be referred to as the "existing facility") on 40 acres of land located in the "Heavy Industry District" as defined under Ayer's zoning by-law. The existing facility is bordered by a rail line and is accessible to vehicular traffic by a road. This facility has 5 unloading tracks that can accommodate 35 rail cars, and it also contains 2000 automobile parking spaces, and an 8800 square foot building. The existing facility receives train service twice daily and truck service about 75 times a day. Cars arrive by rail, are temporarily stored, and then transferred to motor carriers for distribution in New England.

GTI also owns a 126-acre parcel of land (the site) that is bordered by two rail lines and is across the road from the existing facility in Ayer. It is also located entirely in the Heavy Industry District. Guilford claims that it has used the site for off-loading rail cars and storage since 1997. Guilford indicates that it wants to construct and operate a car unloading facility (new facility) on 57.7 acres of the site. The new facility will contain an access road, 6 unloading and 2 support tracks, a parking area for about 3000 cars, and a 55 feet by 75 feet maintenance building, will be

[1] Guilford and Ayer state in the joint petition that three town boards (the Boards of Selectmen, Planning, and Health) and their individual members were made defendants in the court suit. The joint petitioners submit that, for the sake of simplicity, the boards and individuals were not made petitioners. The joint petitioners assert that the agency's decision here "will bind such boards and their members as subdivisions and officials, respectively, of the Town." Joint petition at 2, n.1.

used for unloading from rail cars, temporarily storing, and transferring automobiles to trucks for distribution in New England.

Guilford states that it has sought local approval for construction and operation of the new facility for more than 2 years, through a process it describes as "heavily regulated," involving numerous state and local application and permitting procedures. In May 1998, it filed an application with the Ayer Planning Board requesting site plan approval. Guilford asserts that the Planning Board then convened a public hearing conceming the site plan application, but that it continued the hearing many times before adjourning the hearing on July 2, 1999. In the interim, Ayer had hired a consulting engineering firm to study the site plan and give recommendations about constructing and operating the New Facility. Guilford contends that it made all of the changes recommended in the June 1999 final report and recommendation of the consulting firm, but that in August 1999, the Planning Board, while approving the site plan, required Guilford to satisfy 36 additional conditions. Guilford contends that "[t]hese conditions are illegal, unduly burdensome, and do not substantially increase environmental safety at the Site; collectively, they virtually bar Plaintiffs from using the Site for its intended purpose." Joint petition, Tab B at 6.

Guilford also submits that, on November 18, 1999, the Board of Health found that an auto unloading facility was a "noisome trade" and could thus be prohibited within town limits. In its court complaint, Guilford sought to enjoin Ayer "from regulating or attempting to regulate the construction of either the Existing or New Facilities. . . ." Id. at 9.

DISCUSSION AND CONCLUSIONS

A declaratory order proceeding will be instituted pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721 to permit the Board to address the extent to which Ayer's regulation of Guilford's proposed construction and operation of the automobile unloading facility[2] is preempted by 49 U.S.C. 10501(b),[3] as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). To guide the parties in preparing their submissions addressing the facts of this case, this decision sets out a review of the potentially relevant legal framework.

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[2] The court referral mentions the "proposed development," while Guilford's court complaint seeks, inter alia, to enjoin regulation of both the existing and new facilities. As discussed infra, the parties should clarify whether they seek the Board's views on both facilities or just the new facility.

[3] Section 10501(b) gives the Board exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." It also provides that the "remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

Under the law, the Board conducts environmental reviews of rail construction projects for which a license from the Board is required, such as those involving the extension of a rail line into new territory. See 49 U.S.C. 10901. There is, however, no statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets. See Nicholson v. ICC, 711 F.2d 364, 368-70 (1983), cert. denied, 464 U.S. 1056 (1984); Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale). Railroads also do not require Board authority to upgrade an existing line, and indeed, the law explicitly provides that a license is not required to construct an unregulated spur, industrial. or switching tracks. See 49 U.S.C. 10906.

The fact that the Board does not regulate a particular project, however, does not necessarily mean that the project is subject to local regulation. As the courts have found in addressing the scope of 49 U.S.C. 10501(b), zoning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad's interstate operations. Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997). Moreover, state and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. King County, WA–Petition for Declaratory Order – Burlington N.R.R. – Stampede Pass Line, 1 S.T.B. 731 (1996), clarified, Auburn and Kent, WA– Petition for Declaratory Order – Burlington N.R.R. – Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff'd, City of Auburn v. STB et al., 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn). The argument that the statutory preemption in section 10501(b) is limited to state and local "economic" regulations was rejected by the court of appeals as contrary to the statutory text and unworkable in practice. City of Auburn, 154 F.3d at 1029-31.

Nevertheless, in Stampede Pass and Riverdale, the Board expressed its view that not all state and local regulations that affect railroads are preempted. In particular, the Board stated that state and local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.

Specifically, the Board concluded that local authorities can take actions that are necessary and appropriate to address any genuine emergency on railroad property. Railroads also are required to comply with nondiscriminatory application of local codes for electrical, building, fire, and plumbing to the extent that compliance would not restrict the railroad from conducting its operations or unreasonably burden interstate commerce. Riverdale, slip op. at 8-9. See also Village of Ridgefield Park v. New York, Susquehanna & Western Ry., No. A-101-Sept. Term 1999, 2000 LEXIS (N.J. 2000). With regard to the kinds of inspections that are permissible on property owned or used by interstate railroads, the Board has made it clear that the potential for interference depends on the particular facts involved; the Board sees no simple,

clear line of demarcation that has been or could be drawn, except that the inspection requirements or local regulations must be applied and enforced in a non-discriminatory manner and that preclearance construction-type requirements would generally be preempted. Riverdale, slip op. at 9.

Additionally, the Board has concluded that Federal environmental statutes such as the Clean Air Act and the Clean Water Act are not preempted. Riverdale, slip op. at 7. Thus, the lack of a specific environmental remedy at the Board or at the local level as to construction projects over which the Board lacks licensing power does not mean that there are no environmental remedies under other Federal laws. As this agency does not administer statutes such as the Clean Air Act and the Clean Water Act, however, the Riverdale decision offers no advice as to the circumstances under which a cause of action might be available.

Finally, for projects that do not fall under section 10906, but instead constitute a rail construction project under section 10901, an appropriate environmental review would be conducted under the National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA). See 49 CFR 1105.6(a), (b)(1). See Riverdale at 6, n.12. After conducting such an environmental review, the Board would adopt appropriate environmental mitigation conditions to address environmental concerns raised by the parties, including local authorities. See City of Auburn; Stampede Pass at 8.

Accordingly, the parties should address: whether this project falls under section 10906 or 10901; whether the conditions that Ayer seeks to impose would interfere with interstate railroad operations; and the extent to which both the new and/or existing facilities are subject to Town review.[4]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements presented by interested persons. All persons submitting comments must comply with the Board's Rules of Practice.

2. Guilford, the Town, and any interested person shall submit opening statements by January 8, 2001.

[4] The procedural schedule being adopted is similar to the one proposed by Guilford and Ayer, but it does not include a third set of pleadings that were proposed to filed on February 7, 2001.

3. Guilford, the Town, and any interested person shall file replies on January 28, 2001.

4. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary